

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM OM 09-27

January 6, 2009

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Instructions for Protecting Information Pursuant to
Oil Capitol Sheet Metal Compliance Investigations

This memorandum sets forth instructions to Regions for protecting evidence, obtained pursuant to compliance investigations under Oil Capitol Sheet Metal, Inc.,¹ prior to the opening of a compliance hearing.

Under the Agency's longstanding compliance practice, Regions disclose to respondents evidence underlying the backpay calculations following issuance of a compliance specification.² The Compliance Manual requires that if a respondent that has cooperated in the investigation requests, Regions should, after issuance of the compliance specification, make available all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement.³ This disclosure policy stems from Deering Milliken v. Irving, involving a FOIA request for material in the Board's possession regarding interim earnings, search for work, and similar information relevant to the

¹ 349 NLRB No. 118 (May 31, 2007).

² NLRB Casehandling Manual, Part 3, Compliance Proceedings (Compliance Manual), 10650.5.

³ See Compliance Manual, 10650.5. By contrast, Board representation and unfair labor practice proceedings do not afford the parties pretrial discovery. See, e.g., Amsoil, Inc. v. NLRB, 525 F.Supp. 839 (D. Minn. 1981), affd. 676 F.2d 703 (8th Cir. 1981) (Table); Rainbow Coaches, 280 NLRB 166, 168-169 (1986), enfd. as modified 835 F.2d 1436 (9th Cir. 1987), cert. den. 487 U.S. 1235 (1988).

Region's calculation of a backpay specification.⁴ The Fourth Circuit held that FOIA Exemption 7(A), relating to records compiled for law enforcement purposes, did not exempt the material from disclosure since all that remained in that case was the "largely objective task of ascertaining the amount of backpay" that was due.⁵

Compliance investigations in Oil Capitol⁶ cases require, in addition to traditional evidence regarding interim earnings and search for work, evidence relevant to establishing how long a salt would have remained on the job. As explained in OM Memorandum 08-29, this includes evidence regarding union salting policies or practices, specific organizing plans for the respondent employer, instructions or agreements between the discriminatee and the union, and names of overt and covert organizers hired by the respondent employer or by other nonunion employers that the union was seeking to organize.⁷

Union salting policies, organizing plans, names of overt and covert organizers, etc. are not the routine, objective type of backpay calculations that are normally disclosed pursuant to Section 10650.5 and that the Fourth Circuit addressed in Deering Milliken. Rather, they are the kind of subjective and strategic evidence that would warrant confidentiality protection and exemption from disclosure under FOIA Exemption 4 and protection under FOIA Exemption 7(A) because if treated otherwise, it could interfere with enforcement proceedings.⁸ Non-disclosure is also

⁴ 548 F.2d 1131, 1135 (4th Cir. 1977).

⁵ Ibid.

⁶ 349 NLRB No. 118, slip op. at 6-7 (eliminating the presumption of continued employment for salting discriminatees and requiring the General Counsel, in compliance proceedings seeking backpay and instatement for union salts, to produce affirmative evidence that a salt would have worked for the employer for the entire backpay period claimed in the compliance specification).

⁷ OM 08-29 (CH), "Case Handling Instructions for Cases Involving Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007)," dated February 15, 2008, p. 5.

⁸ Exemption 4 exempts federal agencies from being required to disclose (1) trade secrets and commercial or financial information (2) obtained from a person (3) where the information is privileged or confidential. 5 U.S.C. 552(b)(4). Exemption

consistent with instructions in the Compliance Manual to exempt evidence regarding more controverted issues and to exercise care to ensure that confidentiality and privacy protections are maintained.⁹ If a respondent seeks pre-hearing disclosure of Oil Capitol evidence that a submitter has designated as confidential or that the Region thinks is covered by a FOIA exemption, the Region should inform the respondent of its right to submit a formal FOIA request for the material.¹⁰

Evidence that has traditionally been produced pursuant to Compliance Manual authorization such as, for example, interim earnings and a discriminatee's search for work, should not be withheld. Rather, as directed by the Compliance Manual, that evidence should be made available to respondents upon request and after issuance of the compliance specification.¹¹ In addition, to the extent that Charging Parties claim that evidence that they are providing in the course of a compliance investigation should be withheld, the Regions should instruct them to clearly specify the reason for the claim.¹²

7(A) authorizes the withholding of records or information compiled for law enforcement purposes that could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C. 552(b) (7) .

⁹ The Compliance Manual confines disclosure "only to backpay or related computations, and does not require disclosure of information relating to other issues, such as successor employer, single employer, joint employer, alter ego, disguised continuance, or personal liability." In addition, the Compliance Manual cautions that in implementing this policy, care should be exercised "to ensure that confidentiality and privacy protections, afforded to individuals identified in compliance documents and to neutral third parties who provide documents during the compliance investigations, are maintained." See Compliance Manual, 10650.5.

¹⁰ If a Region receives such a FOIA request, it should consult with Advice before responding.

¹¹ See Compliance Manual, 10650.5.

¹² For example, if Charging Parties claim that information is exempt under Exemption 4, they should explain how it is commercial or financial and confidential. 5 U.S.C. 552(b) (4) . See 2008 FOIA Manual, Chapter VII, p. 10 for the specific

Finally, this memorandum does not implicate the obligations of the General Counsel to provide all appropriate materials under Section 102.118 (the Jencks rule) at the appropriate time.¹³

Any questions regarding the implementation of this memorandum, including whether specific evidence should be withheld from pre-hearing disclosure, should be directed to the Division of Advice.

/s/
R.A.S.

cc: NLRBU
Release to the Public

requirements of a written objection to disclosure of Exemption 4 information.

¹³ See Jencks v. U.S., 353 U.S. 657, 572 (1957). See also NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, 10394.7, Production of Witness Statements. As a practical matter, if a case settles before compliance litigation the evidence may never be disclosed.